

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**VANESSA S. FOSTER**

Claimant

VS.

**LAMPTON WELDING SUPPLY COMPANY, INC.**

Respondent

AND

**LIBERTY MUTUAL INSURANCE COMPANY and  
PACIFIC EMPLOYERS INSURANCE COMPANY**

Insurance Carriers

Docket Nos. 1,022,057  
& 1,035,593

**ORDER**

Respondent and its insurance carrier Pacific Employers Insurance Company appeal the November 15, 2007 preliminary hearing (Docket No. 1,035,593) and post award medical (Docket No. 1,022,057) Order of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded medical treatment with Daniel J. Prohaska, M.D., as the authorized treating physician after the Administrative Law Judge (ALJ) determined that claimant had suffered injuries to her left shoulder and left upper extremity after returning to work at her same duties with respondent. The ALJ found that claimant had suffered a new series of injuries and those injuries were not a direct and natural consequence of her prior work-related injury.

Claimant appeared by her attorney, Joni J. Franklin of Wichita, Kansas. Respondent and its insurance carrier Liberty Mutual Insurance Company appeared by their attorney, John M. Graham, Jr., of Kansas City, Missouri. Respondent and its insurance carrier Pacific Employers Insurance Company appeared by their attorney, Matthew J. Schaefer of Wichita, Kansas.

The Appeals Board (Board) adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing Post Award held October 11, 2007, with attached exhibits; the transcript of Settlement Hearing held May 25, 2005, with attached exhibits; and the documents filed of record in this matter.

**ISSUE**

Did claimant suffer a new compensable injury or injuries arising out of and in the course of her employment with respondent as a result of a series of injuries suffered after her return to work with respondent, or was claimant's increased pain the direct or natural consequence of her prior work-related injury?

**FINDINGS OF FACT**

After reviewing the record compiled to date, the Board concludes the preliminary hearing and post award medical Order should be affirmed.

Claimant began working for respondent on December 4, 2000, performing heavy manual labor. On April 16, 2004, claimant injured her left shoulder while lifting a 175-pound helium cylinder into a customer's pickup truck. Claimant's shoulder was treated by Dr. Prohaska, involving an arthroscopy, subacromial decompression and superior labral repair in June 2004. On December 21, 2004, claimant was released to return to her regular or normal work duties with respondent. Claimant worked, symptom free, for all of 2005. At some point in 2006, she began to notice slight symptoms in her left shoulder. Claimant worked for respondent during this time lifting 50-pound boxes on a regular basis. Claimant also regularly lifted tanks and cylinders ranging from 10 to 175 pounds.

By January 2007, claimant's pain had become more frequent and severe and began waking her in the night. Claimant attributed this increase in pain and problems to her lifting duties with respondent. Claimant contacted respondent's insurance company, Liberty Mutual Insurance Company, on several occasions, requesting medical treatment from the 2004 injury. Finally, in May 2007, claimant was allowed to return to Dr. Prohaska. Claimant was diagnosed with a rotator cuff tear and a ganglion cyst of her supraspinatus rotator cuff tendon. She underwent surgical repair of the rotator cuff on July 11, 2007, again under the care of Dr. Prohaska. Claimant was unable to identify any activities at home or off the job which caused her injuries to worsen or intensify.

In a letter of May 23, 2007, to Marsha Ramsey of Liberty Mutual Insurance Company, Dr. Prohaska responded to a question regarding whether this injury was related to claimant's original injury from 2004. At that time, Dr. Prohaska recommended an MR-arthrogram. He stated in his letter that if the test were negative in regard to the previously treated areas, then claimant's current condition could be considered natural degeneration of the shoulder. If positive, then it would be directly related to her previous injury. It is unclear what questions were presented to Dr. Prohaska which elicited this response, but the answer he presented does not appear to contemplate or address any injury associated with her return to work with respondent after the 2004 injury.

After the MRI results were obtained, Dr. Prohaska wrote a second letter on June 19, 2007, to Ms. Ramsey. Based on the MRI findings, he determined that claimant's injuries were not related to her original work injury.<sup>1</sup>

In a letter dated August 24, 2007, from respondent's attorney, Dr. Prohaska was asked to compare claimant's current complaints with her current job activities or "normal job duties"<sup>2</sup> with respondent. There is nothing in this record to indicate what job activities or job duties were described to Dr. Prohaska.

In his October 8, 2007 response, Dr. Prohaska noted that he had been asked to determine causation of claimant's injuries. He stated:

I have been asked before in regard to causation for this and with normal activities being placed as the only injury, this is an uncommon injury. I cannot attribute this to more than average life experiences and potential propensity for her shoulder to deteriorate some over time, or another way of saying, the natural degeneration process of a shoulder.<sup>3</sup>

Claimant was referred by her attorney to board certified physical medicine specialist Pedro A. Murati, M.D., for an examination on August 23, 2007. Dr. Murati's diagnosis of claimant's injuries compares to that of Dr. Prohaska, with the exception that Dr. Murati found claimant to also have myofascial pain syndrome affecting the left shoulder girdle. Dr. Murati found claimant's current injuries to be the result of her work duties with respondent, beginning January 2007 and every working day thereafter. The history provided Dr. Murati included a description of many of the duties performed by claimant for respondent.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>4</sup>

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<sup>1</sup> P.H. Trans., Resp. Ex. 1.

<sup>2</sup> P.H. Trans., Resp. Ex. 2.

<sup>3</sup> P.H. Trans., Resp. Ex. 1.

<sup>4</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>5</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>6</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>7</sup>

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.<sup>8</sup>

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.<sup>9</sup>

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<sup>5</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>6</sup> K.S.A. 44-501(a).

<sup>7</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>8</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

<sup>9</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.<sup>10</sup>

However, the Kansas Supreme Court, in *Stockman*,<sup>11</sup> stated:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.<sup>12</sup>

An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.<sup>13</sup>

An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.<sup>14</sup>

Claimant originally suffered an injury to her left shoulder in 2004, for which she underwent surgery and was returned to work without limitation. Claimant then worked for respondent performing her regular duties without problems for over a year. Claimant also testified that she performed no activities outside work which caused her problems in her shoulder.

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<sup>10</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>11</sup> *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); see also *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

<sup>12</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

<sup>13</sup> *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 1, 147 P. 3d 1091, rev. denied 281 Kan. \_\_\_\_ (2006).

<sup>14</sup> *Id.* at Syl. ¶ 2.

Respondent argues the opinion of Dr. Prohaska should control since he has been claimant's treating physician for several years and performed both surgeries on claimant. However, this record does not make it clear that Dr. Prohaska was fully aware of claimant's work activities and how those activities may have affected her shoulder. Perhaps this confusion may be cleared up with additional testimony from Dr. Prohaska. For now, the Board finds the opinion of Dr. Murati to be more convincing, that claimant aggravated her shoulder after returning to work for respondent performing her normal job duties from and after January 2007.

### **CONCLUSIONS**

Claimant returned to work for respondent after the first surgery with no limitations or restrictions. She performed her regular job duties for respondent, including heavy lifting on a regular basis for over a year without problems. Only in 2006 did claimant begin to have shoulder problems. Her testimony that her job duties caused the new problems, coupled with the testimony of Dr. Murati, convinces the Board, for preliminary hearing purposes, that claimant has suffered a new series of injuries arising out of and in the course of her employment with respondent beginning in January 2007 and continuing forward from that date. Claimant's request for post-award medical treatment is denied. For these reasons, the preliminary hearing Order of the ALJ should be affirmed.

As this matter is being decided as a preliminary hearing Order, these findings are not binding in Docket No. 1,035,593 upon a full hearing on the claim, but shall be subject to a full presentation of the facts.<sup>15</sup>

### **DECISION**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated November 15, 2007, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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<sup>15</sup> K.S.A. 44-534a.

Dated this \_\_\_\_ day of January, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c:     Joni J. Franklin, Attorney for Claimant  
         John M. Graham, Jr., Attorney for Respondent and its Insurance Carrier Liberty  
         Mutual Insurance Company  
         Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier Pacific  
         Employers Insurance Company  
         Nelsonna Potts Barnes, Administrative Law Judge